

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS CORNELL JACKSON,

Defendant-Appellant.

UNPUBLISHED

April 21, 2011

No. 295994

Wayne Circuit Court

LC No. 09-003770-FC

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of first-degree criminal sexual conduct, MCR 750.520b, assault with intent to commit great bodily harm, MCL 750.84, and unlawful imprisonment, MCR 750.349b. Defendant was sentenced to 20 to 50 years' imprisonment for each first-degree criminal sexual conduct conviction, two to ten years' imprisonment for the assault with intent to commit great bodily harm conviction, and 2 to 15 years' imprisonment for the unlawful imprisonment conviction. We affirm defendant's convictions, but remand for resentencing, for correction of the judgment of sentence and register of actions in docket number 09-003769 and for correction of the register of actions in docket number 09-003770.

Defendant argues that he was denied due process of law when the incorrect docket number was written on his judgment of sentence. We disagree, but remand for the ministerial task of correcting the clerical errors on defendant's judgment of sentence and register of actions for case docket numbers 09-003769 and 09-003770.

Unpreserved constitutional issues are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Under the plain error standard, a defendant must show: (1) that an error occurred, (2) the error was plain, and (3) that the plain error affected his substantial rights in that the error affected the outcome of the lower court proceedings. *Id.* at 763.

Due process entitles a defendant to reasonable notice of the charges against him and an opportunity to present his defense. *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009); *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "[T]he constitutional notice requirement is not some abstract legal technicality requiring reversal in the absence of a perfectly drafted information. Instead, it is a practical requirement that gives effect to a

defendant's right to know and respond to the charges against him." *Darden*, 230 Mich App at 601-602.

Here, the trial court appears to have committed a clerical error. The case with Marjorie Barnett as the victim was assigned docket number 09-003770 while the case with Crystal Neilson as a victim was assigned docket number 09-003769. According to the register of actions for docket number 09-003770, defendant was found guilty of the five crimes committed against Neilson. Defendant's judgment of sentence also incorrectly states that the docket number is 09-003770. Likewise, the register of actions for case number 09-003769, states that the charged crimes against Barnett were dismissed.

Contrary to defendant's assertions, these clerical errors did not deny him due process. Rather, a review of the lower court record reveals that defendant had adequate notice regarding the nature and character of the alleged sexual assaults against Neilson, and defendant was able to defend against those allegations. Both defendant and the prosecution admit that the preliminary examinations for both cases were held on the same day and both cases were separately bound over to circuit court. The amended felony information for docket number 09-003769 alleges that on August 19, 2008, defendant committed three counts of first-degree criminal sexual conduct or, in the alternative, three counts of third-degree criminal sexual conduct against Neilson, defendant committed assault with intent to commit great bodily harm against Neilson, and defendant unlawfully imprisoned Neilson. On October 19, 2009, defense counsel stated on the record that she knew that the Neilson case was the victim and that Barnett's testimony was being sought as other acts evidence pursuant to MRE 404(b). On October 20, 2009, during voir dire, the trial court instructed the potential jurors that the felony information charged defendant with engaging in criminal sexual conduct against Neilson on August 19, 2008.

On October 21, 2009, during the prosecution's opening statement, the prosecution stated that it was going to prove that defendant committed sexual acts against Neilson on August 19, 2008, while defense counsel's opening statement informed the jurors that the only charges before them involved defendant's alleged sexual acts against Neilson. Additionally, after Barnett's and Marketa Delks's testimony was presented to the jury, the trial court instructed the jury that the complainant was Neilson and that the only purpose of the other acts evidence was to prove that defendant had a common plan or scheme. Thereafter, on October 27, 2009, during closing arguments, the prosecution and defense counsel argued that it was the prosecution's responsibility to prove defendant committed criminal sexual conduct against Neilson. Finally, during the jury instructions, the trial court instructed the jury that it was to decide if defendant committed criminal sexual conduct against Neilson. Thus, the record highlights that defendant was aware of the nature and character of the charged crimes and was able to adequately defend against those charges, despite the clerical errors regarding the docket numbers.

Regarding the clerical errors, we remand for correction of the judgment of sentence and the lower court record. MCR 6.435(A);¹ MCR 7.216(A)(4).² As noted by the prosecution, the trial court must correct the docket number on defendant's judgment of sentence. In docket number 09-003769, the trial court must vacate its order of dismissal regarding the Barnett allegations, enter defendant's corrected judgment of sentence regarding Barnett, and correct the register of actions. In docket number 09-003770, the trial court shall vacate its judgment of sentence regarding Neilson, enter an order of dismissal regarding Barnett, and correct the register of actions.

Defendant also asserts he was denied the effective assistance of counsel when counsel failed to object to the alleged due process violation. A defendant must make a testimonial record in the trial court with a motion for a new trial that will support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). In this case, defendant did not make a motion for a new trial or seek an evidentiary hearing at the trial court level, therefore, review is limited to errors apparent on the record. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Thus, the defendant must overcome a strong presumption that defense counsel's actions constituted sound trial strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

Claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). As previously discussed, the amended felony information provided adequate notice regarding the nature of the alleged sexual

¹ MCR 6.435(A) provides, "[c]lerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it."

² MCR 7.216(A)(4) provides, "[t]he Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just: . . . (4) permit amendments, corrections, or additions to the transcript or record."

assaults and defendant had ample opportunity to present his defense. Thus, defense counsel was not ineffective for failing to object. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Furthermore, the evidence presented at trial, including Neilson's testimony that defendant inserted his penis into her vagina multiple times and defendant's DNA found inside Neilson's vagina, provide ample support for defendant's convictions. Because it is not reasonably probable that but for defense counsel's failure to object, the results of the proceedings would have been different, any deficiency in counsel's performance did not constitute ineffective assistance of counsel. See *Noble*, 238 Mich App at 662.

Defendant also argues that the trial court lacked personal jurisdiction over him because of the clerical errors regarding the docket numbers. This unpreserved issue is also reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764, 774. The circuit court gains jurisdiction over the defendant upon the filing of a return by the magistrate showing that the defendant waived his preliminary examination or that an examination was held and the defendant was properly bound over for trial. *People v Farmilo*, 137 Mich App 378, 380; 358 NW2d 350 (1984). Once personal jurisdiction is vested in the circuit court, it "is not lost even when a void or improper information is filed." *People v McGee*, 258 Mich App 683, 695-696; 672 NW2d 191 (2003), quoting *People v Goecke*, 457 Mich 442, 459; 579 NW2d 868 (1998).

Here, both parties acknowledge that preliminary examinations were held on the same day for both docket number 09-003769 and docket number 09-003770. Both parties also admit that both cases were bound over and filed in circuit court. Thus, the circuit court had personal jurisdiction over defendant and the trial court's clerical error of entering the judgment of sentence under the incorrect case docket number does not void jurisdiction. *McGee*, 258 Mich App at 695-696. Defendant has failed to prove prejudicial error requiring reversal occurred because he has not demonstrated that the error affected his substantial rights.

Defendant next argues that the trial court abused its discretion in determining that the prosecution showed due diligence in attempting to produce Barnett as a witness. Preserved evidentiary issues are reviewed for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). An abuse of discretion exists if the results are outside the principled range of outcomes. *Id.* at 588-589. In a criminal case, if error is found, reversal is not required unless the defendant establishes that, more probably than not, a miscarriage of justice occurred because of the error. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

MRE 804(b) provides in relevant part:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an

opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Thus, before a declarant's prior testimony may be admitted as an exception to the hearsay rule, the trial court must determine that the declarant is unavailable. MRE 804(a)(5) provides that unavailability as a witness includes situations where the declarant

is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means, and in a criminal case, due diligence is shown.

Due diligence means that in order for a declarant to be deemed unavailable under MRE 804(a)(5), the prosecution must have made a diligent, good faith effort in its attempt to locate the declarant. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). "The test is one of reasonableness and depends on the facts and circumstances of each case" *Id.*

The trial court did not abuse its discretion in finding that the prosecution exercised due diligence in attempting to procure Barnett's attendance at trial. The due diligence hearing conducted by the trial court reveals that Officer Kane began searching for Barnett around October 5, 2009, about three to four weeks before trial. Officer Kane began by going to Mr. Ellis's address because that was the address Barnett lived at when she was successfully served for the preliminary examination held on February 13, 2009. When Officer Kane went to the address, Ellis informed Kane that Barnett no longer resided with him and Ellis believed she now lived somewhere off the Southfield freeway. Ellis did not have a street name or house address to provide Kane. Kane then contacted Clifford Peeler, a former acquaintance of Barnett, because she had previously provided Kane with Peeler's name, telephone number, and address. However, Peeler did not know where Barnett currently resided.

Thereafter, Kane ran a LEIN check, called various jails and hospitals, and contacted the food stamp program, but he was unsuccessful in finding Barnett. Kane also searched the general area of Whitcomb, Greenfield, Plymouth, and the Southfield freeway by Joy Road in an attempt to locate Barnett. Although Kane did not check for utility bills or social security income in Barnett's name and he did not set up surveillance at Ellis's residence, Kane received assurances from both Ellis and Peller that they would contact Kane if they received any information regarding Barnett. Furthermore, Kane continued to run LEIN checks and made phone calls regarding Barnett throughout the weekend before trial.

Under these circumstances, the efforts made by Kane were reasonable and satisfy the due diligence requirement. Because Barnett was readily available for the preliminary examination, Kane did not have a reason to believe that Barnett would be difficult to locate and he made diligent, good faith efforts beginning a few weeks before trial to locate Barnett. Although Kane did not look into every possible source, his efforts were reasonable under the circumstances.

Thus, the trial court properly exercised its discretion in determining that Barnett was unavailable pursuant to MRE 804(a)(5) and in admitting Barnett's prior preliminary examination testimony pursuant to MRE 804(b)(1).³

Defendant also asserts that the admission of Barnett's prior testimony violated his confrontation rights. Whether a defendant's right of confrontation was violated is a question of constitutional law that this Court reviews de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

A defendant has a constitutional right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Bean*, 457 Mich at 682. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Lonsby*, 268 Mich App 375, 377; 707 NW2d 610 (2005), rev'd in part on other grounds 485 Mich 858 (2009). The prosecution may use preliminary examination testimony "whenever the witness giving such testimony can not, for any reason, be produced at the trial[.]" MCL 768.26. Here, as previously discussed, the prosecution was allowed to use Barnett's prior preliminary examination testimony because the trial court properly ruled that Barnett was unavailable to testify at trial. Furthermore, at the preliminary examination, defendant had ample opportunity to cross-examine M.B. regarding the circumstances of the alleged criminal acts. Defendant's right to confrontation was not violated.

The last issue on appeal is a sentencing one. Defendant argues, and the prosecution agrees, that the trial court erred in departing from defendant's minimum sentencing guidelines range when it sentenced defendant without stating substantial and compelling reasons for its departure. A trial court's decision to depart from the sentencing guidelines is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). It is for clear error that we review the existence of a particular factor supporting a trial court's decision to depart from the sentencing guidelines and for an abuse of discretion that we review whether a reason is objective and verifiable. *Id.*

Under MCL 769.34(2), a trial court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. The trial court may only depart from the sentencing guidelines if it has a substantial and compelling reason to do so, and it states the reasons on the record. MCL 769.34(3); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Additionally, the trial court's reasons for departing from the guidelines range must be objective and verifiable. *Id.* at 74.

³ Furthermore, even if the trial court erred in admitting Barnett's prior testimony, the error would not require reversal. Here, other acts evidence was also introduced through Delks, as well as the direct testimony of Neilson. Thus, defendant has failed to show that a miscarriage of justice occurred because the error would not be outcome determinative. *Lukity*, 460 Mich at 495.

The parties agree that defendant's correct minimum sentencing guidelines range is 135 to 225 months, and that the trial court exceeded defendant's minimum sentencing guidelines range by sentencing defendant to a minimum of 240 months without stating a substantial and compelling reason to do so. While the trial court did state that defendant engaged in predatory conduct and betrayed the trust of Neilson, it did not specifically state that it was departing from the sentencing guidelines, nor did the trial court apprise defendant of his right to appeal the trial court's upward departure from the sentencing guidelines. Thus, the trial court abused its discretion in sentencing defendant to an upward departure from his minimum sentencing guidelines range without stating a substantial and compelling reason and defendant is entitled to resentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004).

Affirmed, but remanded for resentencing, for correction of the judgment of sentence and the register of actions in docket number 09-003769, and for correction of the register of actions in docket number 09-003770. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray